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RECENT DECISIONS

FRANCIS DE L. CUNNINGHAM, *Editor-in-Charge*

DOUGLAS H. KENYON, *Associate Editor*.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—ATTESTING WITNESS.—The plaintiff sued the executor of the deceased for breach of an alleged agreement by the testator to make a will with specific bequests to the plaintiff's grandniece. She called the testator's attorney as a witness. He produced two wills which he drew for the testator, both signed by him as attesting witness, together with written instructions for the preparation of the will, and offered to prove, by their contents and from what the testator told him at the time, an agreement whereby the testator was to make provision for the plaintiff's niece. The evidence was refused and the plaintiff non-suited. On appeal, judgement was reversed, but the lower court was sustained in refusing the attorney's testimony. *Anderson v. Searles* (N. J. 1919) 107 Atl. 429.

When an attorney signs a will as an attesting witness, his testimony is admitted on the theory that by making him an attesting witness the testator has waived the privilege. 4 Wigmore, Evidence, § 2315; 4 Jones, Evidence, § 756. Thus in such cases the courts have allowed the attorney to testify in an action between persons all claiming under the will, if the will is in question, as to the mental capacity of the testator, *In re Mullin* (1895) 110 Cal. 252, 42 Pac. 645, undue influence, *In re Pitt's Estate* (1893) 85 Wis. 162, 55 N. E. 860, contents of the will if lost, *Kern v. Kern* (1900) 154 Ind. 29, 55 N. E. 1004, whether the contents were made known to the testator, *Coates v. Semper* (1901) 82 Minn. 460, 85 N. W. 217, whether the testator intentionally omitted certain persons, see *Brown v. Brown* (1906) 77 Neb. 125, 108 N. W. 180, and generally as to the testator's conduct and conversation at the time of the preparation and execution of the will. *Matter of Coleman* (1888) 111 N. Y. 220. But while by making the attorney an attesting witness, the testator intends to put him in a position to perform the functions of such witness, 4 Wigmore, *op. cit.*, § 2315, he does not altogether sever the relation of attorney and client. *Emerson v. Scott* (1905) 39 Tex. Civ. App. 65, 87 S. W. 369 (*semble*). For it would seem to be his intention that the attorney should testify only when the validity and effect of the will is in some way brought in question.

CARRIERS—LIMITATION OF LIABILITY—FREE PASS—GROSS NEGLIGENCE.—The plaintiff, while riding on a free pass containing a stipulation that the holder assumed all risk of accident resulting from negligence, was injured by reason of the train of the defendants running into an open switch. The court, accepting the statutory definition of gross negligence as the want of slight care and diligence, Okla. Rev. Laws 1910 §§ 2916-2919, *held*, that the defendant, though not liable for the ordinary negligence of its employees, was liable for gross negligence. *Mis-souri, K. & T. Ry. v. Zuber* (Okla. 1919) 184 Pac. 452.

The court applied a statute to the effect that a common carrier cannot be exonerated by any agreement from liability for gross negligence. Okla. Rev. Laws 1910 § 797. Other jurisdictions have interpreted similar statutes in like manner. *Norfolk & W. Ry. v. Tanner* (1902) 100

Va. 379, 41 S. E. 721; *Walther v. Southern Pac. Co.* (1911) 159 Cal. 769, 116 Pac. 51. A possible view in the instant case would have been that the railroad did not stand in the relation of a common carrier to the passenger who was not being carried for hire, 12 Columbia Law Rev. 642, but that its position was analogous to that of a gratuitous bailee, see *Kinney v. Central R. R.* (1868) 32 N. J. L. 407, 410, *aff'd* (1869) 34 N. J. L. 513, 515; *Quimby v. Boston & M. R. R.* (1890) 150 Mass. 365, 371, 23 N. E. 205, and therefore that the prohibitory statute did not apply in this case. If it had taken this view, the court would then have been free to have followed the weight of authority, which is that the carrier of a passenger on a free pass may exempt itself from liability for negligence. *Boering v. Chesapeake Beach Ry.* (1904) 193 U. S. 442, 24 Sup. Ct. 515; 12 Columbia Law Rev. 642; 28 Harvard Law Rev. 560; *contra*, *Gulf, Colo. & S. F. Ry. v. McGown* (1886) 65 Tex. 640; *Annas v. Milwaukee & N. R. R.* (1886) 67 Wis. 46, 30 N. W. 282.

CONSTITUTIONAL LAW—IMMUNITY OF UNITED STATES FROM SUIT—ACTION AGAINST GOVERNMENT-OWNED CORPORATION.—The United States purchased the real and personal property, stock and bonds of the defendant railroad corporation. In a suit against the corporation for malicious prosecution, *held*, that without the consent of the government, the action could not be maintained. *Ballaine v. Alaska Northern Ry.* (C. C. A., 9th Cir. 1919) 259 Fed. 183.

The United States as well as any state thereof, is sovereign and cannot be sued without its consent. *Occidental Const. Co. v. United States* (C. C. A. 1917) 245 Fed. 817; *Smith v. Reeves* (1900) 178 U. S. 436, 20 Sup. Ct. 919. A government may exercise its functions through public officers and other agencies, *Berman v. Minnesota State Agriculture Soc.* (1904) 93 Minn. 125, 100 N. W. 732, and within their authority they are exempt from suit. *Ex parte Ayers* (1887) 123 U. S. 443, 8 Sup. Ct. 164. But where their authority is exceeded, although the agency may be liable the state is still exempt. See *Hans v. Louisiana* (1890) 134 U. S. 1, 16, 10 Sup. Ct. 504. Where the state is necessarily the true party in interest, even though not a party to the record, immunity is granted, *Hopgood v. Southern* (1886) 117 U. S. 52, 6 Sup. Ct. 608; see *Minnesota v. Hitchcock* (1902) 185 U. S. 373, 381, 22 Sup. Ct. 650, and it would seem the better reasoning not to deny the applicability of this rule, on the theory of corporate entity, where the state owns all the stock and property of a corporation. *Cf. Cunningham v. Macon & Brunswick R. R.* (1883) 109 U. S. 446, 3 Sup. Ct. 292; *contra*, *Panama R. R. v. Curran* (C. C. A. 1919) 256 Fed. 768. A distinction is often sought to be drawn rendering the agency, and through it, the state liable where the enterprise is of a private nature. *Hopkins v. Clemson Agricultural College* (1911) 221 U. S. 636, 647, 31 Sup. Ct. 654. It is submitted that the opposite conclusion is more clearly reasoned, immunity from suit, being a necessary adjunct to sovereignty should obtain in all suits against the government. *Murray v. Wilson Distilling Co.* (1909) 213 U. S. 151, 29 Sup. Ct. 458; *Riddoch v. State* (1912) 68 Wash. 329, 123 Pac. 450; *Clodfetter v. State* (1882) 86 N. C. 51. It should be noted that municipal corporations may be distinguished on the ground that they partake of sovereignty only where exercising public functions imposed by law; and where pursuing private enterprises, there is nothing inherent in such corporations that *per se* should render them immune. See *Hill v. City of Boston* (1877) 122 Mass. 344.